87-1437

No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1987

Supreme Court, U.S.
FILED
FEB 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

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| MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, vs. CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent. | NSCT. NO. 17948 (Blanton) NSCT. NO. 18065 (Fraley) |

On Writ of Certiorari To The
Supreme Court of The State of Nevada

PETITION FOR WRIT OF CERTIORARI

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## I.

## QUESTION PRESENTED FOR REVIEW

Whether the misdemeanor offense of driving under the influence of intoxicating liquor ("D.U.I") under Nevada state law is a "serious" crime allowing a right to jury trial.

II.

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## III.
## GROUNDS UPON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

### A.

### The Date of Judgment Sought to be Reviewed

The Supreme Court of the State of Nevada on December 31, 1987, denied the Appeal of Defendant, Blanton, and further reversed the Order of the Eighth Judicial Court, Clark County, Nevada, granting Defendant, Fraley, a jury trial. Both Defendants were thereby denied jury trials for their D.U.I. offenses. (See Appendix, Tab "A", copy of the Decision).

### B.

### Date of Order Denying Rehearing

No petition for rehearing was filed by either Defendant in the Supreme Court of Nevada.

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C.

## Statutory Provision Conferring Jurisdiction On This Court to Review the Judgment by Writ of Certiorari

28 U.S.C. §1257 provides:

> **State courts; appeal; certiorari**
>
> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> (1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the

ground of its being repugnant to the Constitution, treaties of laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

D.

**Statutory Provisions**

Nevada Revised Statute 484.379 provides:

**484.379. Driving while intoxicated: Unlawful acts.**

1. It is unlawful for any person who:

(a) Is under the influence of intoxicating liquor; or

(b) Has 0.10 percent or more by weight of alcohol in his blood, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.

2. It is unlawful for any person who is an habitual user of or under

the influence of any controlled substance, or is under the combined influence of intoxicating liquor and a controlled substance, or any person who inhales, ingests, applies or otherwise uses any chemical, poison or organic solvent, or any compound or combination of any of these, to a degree which renders him incapable of safely driving or exercising actual physical control of a vehicle to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access. The fact that any person charged with a violation of this subsection is or has been entitled to use that drug under the laws of this state is not a defense against any charge of violating this subsection.

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Nevada Revised Statute 484.3792 provides:

> **484.3792. Driving while intoxicated: Penalties; segregation of offender; probation, suspension of sentence and plea bargaining prohibited; intermittent confinement; consecutive sentences.**
>
> 1. Any person who violates the provisions of NRS 484.379:
>
> (a) For the first offense within 7 years, is guilty of a misdemeanor. Unless he is allowed to undergo treatment as provided in NRS 484.3794, the court shall:
>
> (1) Order him to pay tuition for an educational course on the abuse of alcohol and controlled substances approved by the department and complete the course within the time specified in the order, and the court shall notify the department if he fails to complete the course within the specified time;
>
> (2) Unless the sentence is reduced pursuant to NRS 484.3794, sentence him to

imprisonment for not less than 2 days nor more than 6 months in jail, or to perform 48 hours of work for the community while dressed in distinctive garb which identifies him as having violated the provisions of NRS 484.379; and

(3) Fine him not less than $200 nor more than $1,000.

The teacher of the educational course shall evaluate the offender and, if he finds the offender is an abuser of alcohol or controlled substances, he shall promptly report his findings to the court for its use.

(b) For a second offense within 7 years, is guilty of a misdemeanor. Except as provided in NRS 484.3794, the court shall sentence him to imprisonment for not less than 10 days nor more than 6 months in jail and fine him not less than $500 nor more than $1,000.

(c) For a third or subsequent offense within 7 years, shall be punished by imprisonment in the state prison for not less than 1 year nor more than 6 years

and must be further punished by a fine of not less than $2,000 nor more than $5,000. An offender so imprisoned must be segregated insofar as practicable from offenders whose crimes were violent, and must be assigned to an institution of minimum security or, if space is available, to an honor camp, restitution center or similar facility.

2. Any offense which occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions. The facts concerning a prior offense must be alleged in the complaint, indictment or information, must not be read to the jury or proved at trial but must be proved at the time of sentencing, if the principal offense is alleged to be a felony, must also be shown at the preliminary examination or presented to the grand jury.

...

3. No person convicted of violating the provisions of NRS 484.379 may be released on probation, and no sentence imposed for violating those provisions may be suspended. No prosecuting attorney may dismiss a charge of violating the provisions of NRS 484.379 in exchange for a plea of guilty or nolo contendere to a lesser charge or for any other reason unless he knows or it is obvious that the charge is not supported by probable cause or cannot be proved at the time of trial.

4. Any term of confinement imposed under the provisions of this section may be served intermittently at the discretion of the judge or justice of the peace, except that a person who is convicted of a second or subsequent offense within 7 years must be confined for at least one segment of not less than 48 consecutive hours. This discretion must be exercised after considering all the circumstances surrounding the offense, and the family and employment of the offender, but any sentence of 30 days or less must be served within 6 months

after the date of conviction or within 6 months after the date of sentencing if the offender underwent treatment pursuant to NRS 484.3794. Any time for which the offender is confined must consist of not less than 24 consecutive hours.

5. Jail sentences simultaneously imposed under this section and NRS 483.560 or 485.330 must run consecutively.

6. As used in this section, unless the context otherwise requires, "offense" means a violation of NRS 484.379 or 484.3795 or homicide resulting from the driving of a vehicle while under the influence of intoxicating liquor or a controlled substance, or the violation of a law of any other jurisdiction which prohibits the same conduct.

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Nevada Revised Statute 483.460 provides:

**483.460. Mandatory revocation of license, permit or privilege to drive; periods of revocation.**

1. Unless otherwise provided by statute, the department shall revoke the license, permit or privilege of any driver upon receiving a record of his conviction of any of the following offenses, when that conviction has become final, and the driver is not eligible for a license, permit or privilege to drive for the period indicated:

(a) For a period of 3 years if the offense is:

(1) Violation of NRS 484.3795 or subsection 2 of NRS 484.377 or homicide resulting from driving a vehicle while under the influence of intoxicating liquor or a controlled substance.

(2) A third or subsequent violation within 7 years of NRS 484.379.

(b) For a period of 1 year if the offense is:

(1) Any other manslaughter resulting from the driving of a motor vehicle or felony in the commission of which a motor vehicle is used, including the unlawful taking of a motor vehicle.

(2) Failure to stop and render aid as required under the laws of this state in the event of a motor vehicle accident resulting in the death or bodily injury of another.

(3) Perjury or the making of a false affidavit or statement under oath to the department under NRS 483.010 to 483.630, inclusive, or under any other law relating to the ownership or driving of motor vehicles.

(4) Conviction, or forfeiture of bail not vacated, upon three charges of reckless driving committed within a period of 12 months.

(5) A second violation within 7 years of NRS 484.379 and the driver is not eligible for a restricted license during any of that period.

(c) For a period of 90 days, if the offense is a first violation within 7 years of NRS 484.379.

2. The department shall revoke the license, permit or privilege of a driver convicted of violating NRS 484.379 who fails to complete the educational course on the use of alcohol and controlled substances within the time ordered by the court and shall add a period of 90 days during which the driver is not eligible for a license, permit or privilege.

3. When the department is notified by a court that a person who has been permitted to enter a program of treatment pursuant to NRS 484.3794 the department shall reduce by half the period during which he is not eligible for a license, permit or privilege to drive, but shall restore that reduction in time if notified that he was not accepted for or failed to complete the treatment.

## E.

## Statement of Facts

### (Blanton)

Defendant, Blanton, was arrested for D.U.I. in North Las Vegas, Nevada, on July 18, 1986, and charged by citation with a violation of N.R.S. 484.379 (D.U.I.). Written demand for jury trial was denied by the North Las Vegas Municipal Court, and an original petition for writ of mandamus was filed in the Eighth Judicial District Court, Clark County, State of Nevada, which later denied the same. Appeal was taken to the Nevada Supreme Court which affirmed the lower court's decision denying the jury trial.

### (Fraley)

Defendant, Fraley, was arrested on June 29, 1986, in North Las Vegas, Nevada, and charged with a violation of N.R.S. 484.379 (D.U.I.). Written demand for jury trial was denied by the North Las Vegas

Municipal Court, and Fraley plead guilty. Notice of Appeal to the Eighth Judicial District Court was timely filed for Trial de novo. This latter court granted Defendant's demand for jury trial and remanded; the City of North Las Vegas, Nevada, filed a petition for writ of certiorari with the Supreme Court of Nevada, which Court later, on December 31, 1987, reversed the lower court, thereby denying Fraley's jury trial.

Blanton's Appeal (NSCT No. 17940) and Fraley's Case (NSCT No. 18065) were considered along with 9 other cases upon the same issue by the Nevada Supreme Court.

**F.**

**Stage In State Proceedings That Federal Issue Was First Presented**

The federal issues were first formally considered orally and in writing before the Eighth Judicial District Court, Clark County, State of Nevada, and later

before the Supreme Court of the State of Nevada which addressed the federal issues in its Decision.

G.

**Contentions Relied On for Allowance of Writ of Certiorari**

(1.)

**D.U.I. Is A "Serious" Crime Which Should Be Triable By Jury**

N.R.S. 484.3792 requires a person convicted of first offense D.U.I. to:

(a) 2 days incarceration or 48 hours (six (6) eight (8) hour days) of community service work; 6 months maximum incarceration is allowed by statute

(b) a mandatory minimum $200 fine, and up to $1,000 maximum

(c) mandatory court counseling which costs the Defendant about $150, and

(d) NRS 484.384 requires a mandatory driver's license revocation for 90 days upon DUI conviction by the State of Nevada Department of Motor Vehicles.

(e) As a practical matter, automobile insurance premiums skyrocket for a person convicted of D.U.I.

(f) Upon a second conviction for misdemeanor D.U.I. within a 7-year period, a mandatory 10 days incarceration and a mandatory minimum fine of $500.

(g) A third arrest for D.U.I. within 7 years is a felony carrying, upon conviction, a mandatory minimum prison term of 1 year (up to 6 years) and a fine of not less than $2000 up to $5000.

The direct and collateral consequences of conviction for D.U.I. require the option of a jury trial to a Defendant so charged. Duncan v. Louisiana, 391 U.S. 145 (1968). It is equally clear that our society considers a charge of D.U.I. to be a "serious" crime, thereby mandating the option of a jury trial. Baldwin v. New York, 399 U.S. 66, 68 (1970) (plurality opinion); District of Columbia

v. Clawans, 300 U.S. 617, 628 (1937).

(2.)

**The Standard for A Jury Trial Set Out In Duncan v. Louisiana Has Been Met**

Duncan v. Louisiana, supra, indicates that a national standard is the test for jury trial. See Appendix, Tab "B", for a listing of States which allow D.U.I. jury trials. The State of Nevada is a part of a minority of States which deny a jury trial in a D.U.I. prosecution.

(3.)

**Unequal Application of the Law Is Resulting Because of This Unresolved Issue**

The Supreme Court of Nevada has ruled that a jury trial is not allowed in D.U.I. prosecutions by either the State of Federal Constitutions in State or City courts in the State of Nevada.

The federal district court for the District of Nevada has recently ruled that a jury trial is allowed in the State of Nevada pursuant to federal law. See

Appendix, Tab "C", Decision in Bronson v. Swinney, 648 F.Supp. 1094 (D. Nev. 1986), now on Appeal to the Court of Appeals for the Ninth Circuit.

The Ninth Circuit Court of Appeals itself has ruled that D.U.I. is a "serious" charge carrying a right to jury trial. United States v. Craner, 652 F.2d 23 (CA9 1981); United States v. Best, 573 F.2d 1095, 1099 (CA9 1978). Compare, District of Columbia v. Colts, 282 U.S. 63 (1930) where this Court held that reckless driving was both indictable at common law and Malem in se, and thereby "serious".

The way things stand now in Nevada is that a Defendant cannot obtain a jury trial in a State or city court, but can obtain a jury trial in federal court for D.U.I. if he happens to be arrested on federal land. But more importantly, a Defendant who is convicted of D.U.I. in State court can simply file a petition for writ of habeas

corpus pursuant to 28 U.S.C. §2254 in federal court where, as a matter of federal law, the State conviction is vacated and remanded to the State or city court for Trial before a jury. Defendants who cannot afford legal fees for a federal petition for writ of habeas corpus are denied a jury trial, while more affluent Defendants can have their convictions vacated.

Not only is the State of Nevada seemingly in conflict with most States (which allow jury trials in D.U.I. cases), but is in conflict with the Ninth Circuit Court of Appeals as to the allowance of a jury trial in D.U.I. cases pursuant to federal law. It has been held that a direct conflict between a decision of a Court of Appeals and that of the highest court of a State where that conflict concerns a federal question, is an established reason for a grant of certiorari. Anderson v. Maryland, 427 U.S.

463 n.5 (1976); Lakeside v. Oregon, 435 U.S. 333, 336 & N.3 (1978); Baldwin v. Alabama, 472 U.S. 372 (1985).

Likewise, the Supreme Court of the State of Nevada's decision in the within cases is at a precise loggerhead with the decision of the federal court of the District of Nevada in Bronson v. Swinney, supra. Such a conflict is also a recognized reason for a grant of certiorari. Cf. Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) (this Court noted probable jurisdiction of an appeal from the highest state court to resolve a conflict between that court and a federal 3-judge court, both having ruled on the constitutionality of the same state statute); see also Ward v. Illinois, 431 U.S. 767, 770-71 (1977).

Certiorari should be granted in these cases to resolve this intolerable federal-state conflict over jury trials in Nevada

state D.U.I. cases.

## IV.

## CONCLUSION

For the above-cited reasons, this Court should grant certiorari in these cases to consider the issue on the merits.

DATED this 24th day of February, 1988.

GRAVES, LEAVITT & KOCH

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## CERTIFICATE OF SERVICE BY MAIL

| | | |
|---|---|---|
| MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, | ) | |
| vs. | ) | NSCT. NO. 17940 (Blanton) |
| CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent. | ) | NSCT. NO. 18065 (Fraley) |

STATE OF NEVADA )
) ss:
COUNTY OF CLARK )

The undersigned hereby certifies and affirms that I am an Employee of the law office of JOHN J. GRAVES, JR., ESQ., attorney for Petitioner in the above-entitled matter, and a person of such age and discretion as to be competent to serve papers.

That on February 24th, 1988, I served a copy of the foregoing and attached PETITION FOR WRIT OF CERTIORARI by depositing same in an enclosed in an

envelope, first-class postage fully prepaid in the United States Mails, addressed as follows:

City of North Las Vegas
City Attorney's Office
Criminal Division
1301 East Lake Mead
North Las Vegas, Nevada 89030

ATTORNEY GENERAL'S OFFICE
300 South Fourth #1100
Las Vegas, Nevada 89158

STATE OF NEVADA ATTORNEY GENERAL'S OFFICE
Heroes Memorial Building
Carson City, Nevada 89710

Theresa J. Cole, An Employee of
JOHN J. GRAVES, JR., ESQ.

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**CERTIFICATE OF MAILING BY COUNSEL FOR PETITIONER**

| | | |
|---|---|---|
| MELVIN R. BLANTON, MARK D. FRALEY, Petitioners, | ) | |
| vs. | ) | NSCT. NO. 17940 (Blanton) |
| CITY OF NORTH LAS VEGAS, STATE OF NEVADA, Respondent. | ) | NSCT. NO. 18065 (Fraley) |

Pursuant to Rule 28.2 of the Rules of the Supreme Court of the United States, Counsel for Petitioner herein, a member of the Bar of this Court, Certifies that to his knowledge the Petition for Writ of Certiorari was mailed to this Court on the 24th day of February, 1988, within the permitted time to file said Petition, and that copies of the same were, on that date mailed to the North Las Vegas City Attorney's Office, Attorney General's Office, Las Vegas, Nevada,and State of Nevada Attorney General's Office, Carson,

City, Nevada.

DATED this 24th day of February, 1988.

John J. Graves, Jr.
JOHN J. GRAVES, JR., ESQ.

SUBSCRIBED AND SWORN to before me

this 24th day of February, 1988.

Theresa J Cole
NOTARY PUBLIC in and for
Clark County, State of Nevada.

THERESA J. COLE
OFFICIAL SEAL
NOTARY PUBLIC-NEVADA
CLARK COUNTY
My Appointment Expires Aug. 1, 1990